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U.S. Citizenship
and Immigration
Services

PUBLIC COPY

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FILE:

SRC 03 107 51573

Office: TEXAS SERVICE CENTER

Date: DEC 02 2004

IN RE:

Petitioner:

Beneficiary:

PETITION:

Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to
Section 203(b) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned
to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Texas Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a gas station/convenience store. It seeks to employ the beneficiary permanently in the United States as a retail store manager. As required by statute, a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor, accompanies the petition. The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition.

On appeal, the petitioner submits a brief.

Section 203(b)(3)(A)(i) of the Act, 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

The regulation at 8 C.F.R. § 204.5(g)(2) states, in pertinent part:

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be in the form of copies of annual reports, federal tax returns, or audited financial statements.

Eligibility in this matter hinges on the petitioner's continuing ability to pay the wage offered beginning on the priority date, the day the request for labor certification was accepted for processing by any office within the employment system of the Department of Labor. See 8 C.F.R. § 204.5(d). Here, the request for labor certification was accepted on April 25, 2001. The proffered salary as stated on the labor certification is \$9.73 per hour or \$20,238.40 per year.

With the petition, counsel submitted a copy of the petitioner's Form 1120, U.S. Corporation Income Tax Return, for the fiscal year October 1, 2000 through September 30, 2001. The tax return reflected taxable income before NOL deduction and special deductions of \$3,972 and net current assets of \$8,255. The director determined this evidence to be insufficient to establish the ability to pay the proffered wage from the priority date and continuing. On November 14, 2003, the director issued a notice of Intent to Deny the petition and requested additional evidence of the petitioner's ability to pay the proffered wage to be in the form of copies of either annual reports, federal tax returns, or audited financial statements. The director specifically requested the additional evidence to include documentation for 2002 and 2003.

In response, counsel provided a copy of the front page of the petitioner's Form 1120, U.S. Corporation Income Tax Return for fiscal year October 1, 2000 through September 30, 2001, a complete copy of the

petitioner's Form 1120, U.S. Corporation Income Tax Return for fiscal year October 1, 2001 through September 30, 2002, a copy of a bank statement for the month ended November 30, 2003, and a copy of the petitioner's Forms UCT-6, Florida Employer's Quarterly Reports, for the first and second quarter of 2003. The 2002 federal tax return reflected a taxable income before net operating loss deduction and special deductions of \$20,348 and net current assets of \$24,851. The bank statement reflected a beginning balance of \$6,824.12 and an ending balance of \$2,084.14. The Forms UCT-6 reflected the petitioner employing only one person (the owner) for the first and second quarter of 2003.

The director determined that the evidence submitted did not establish that the petitioner had the ability to pay the proffered wage in 2001, and, on December 23, 2003, denied the petition.

On appeal, counsel asserts:

This I-140 was denied based on Office [sic] #27's conclusion of Dinaj's inability to pay the alien the proffered salary of \$9.73 per hour or \$20,238.40 per year in 2001, the year the Application for Alien Employment Certification was filed. In part, Officer #27 states that the only income available to pay the alien's proffered salary in 2001 was \$3,972.00 less the sum of \$596.00 after income tax payment, which was clearly not sufficient. However, [REDACTED] 2001 Corporation Income Tax Return indicates a sum of \$15,353.00 in unappropriated earnings. This information can be found on page 4, schedule L Liabilities and Shareholders' Equity #25, copy enclosed as Exhibit 2. These funds were immediately available to Dinaj to use as needed. This amount coupled with the \$3,376.00 in net income totaled \$18,729.00. [REDACTED] would need less than \$1,600.00 to pay the proffered salary. [REDACTED] owner and president, Mr. [REDACTED] Reza, had sufficient business funds from other businesses to make up this small sum. Please refer to the enclosed April 1 to April 30, 2001 bank statement from Bank of America for Team Foodmart, Inc., another business owned by Mr. [REDACTED] indicating an average ledger balance of \$1,976.86 and a statement ending balance of \$9,836.86 in April 2001 as Exhibit 3. These funds were also immediately available to be transferred into the Dinaj's business account in April 2001 to pay the alien the proffered salary of \$9.73 per hour or \$20,238.40 per year. Based on this supporting documentation, Dinaj was in a financial position to hire the alien in the year 2001.

In determining the petitioner's ability to pay the proffered wage, Citizenship and Immigration Services (CIS) will first examine whether the petitioner employed the beneficiary at the time the priority date was established. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, this evidence will be considered prima facie proof of the petitioner's ability to pay the proffered wage. In the present matter, the petitioner did not establish that it had employed the beneficiary at a salary equal to or greater than the proffered wage in 2001.

As an alternative means of determining the petitioner's ability to pay the proffered wage, CIS will next examine the petitioner's net income figure as reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. Reliance on federal income tax returns as a basis

for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); see also *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Tex. 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F.Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). In *K.C.P. Food Co., Inc.*, the court held that CIS had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. 623 F.Supp at 1084. The court specifically rejected the argument that CIS should have considered income before expenses were paid rather than net income. Finally, there is no precedent that would allow the petitioner to "add back to net cash the depreciation expense charged for the year." See also *Elatos Restaurant Corp.*, 632 F. Supp. at 1054.

Nevertheless, the petitioner's net income is not the only statistic that can be used to demonstrate a petitioner's ability to pay a proffered wage. If the net income the petitioner demonstrates it had available during that period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, CIS will review the petitioner's assets. The petitioner's total assets include depreciable assets that the petitioner uses in its business. Those depreciable assets will not be converted to cash during the ordinary course of business and will not, therefore, become funds available to pay the proffered wage. Further, the petitioner's total assets must be balanced by the petitioner's liabilities. Otherwise, they cannot properly be considered in the determination of the petitioner's ability to pay the proffered wage. Rather, CIS will consider *net current assets* as an alternative method of demonstrating the ability to pay the proffered wage.

Net current assets are the difference between the petitioner's current assets and current liabilities.¹ A corporation's year-end current assets are shown on Schedule L, lines 1(d) through 6(d). Its year-end current liabilities are shown on lines 16(d) through 18(d). If a corporation's end-of-year net current assets are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage out of those net current assets. The petitioner's net current assets during the year in question, 2001 was \$8,255. The petitioner could not have paid the proffered wage in 2001 from its net current assets.

Counsel suggests that the petitioner's unappropriated retained earnings should also be considered in support of its financial ability to pay the beneficiary's wage offer. Counsel cites no authority for this proposition. It is noted that the court in *Sitar v. Ashcroft*, (2003 WL 22203717 (D. Mass)) specifically rejected this line of reasoning, concluding that CIS had sufficiently considered the petitioner's assets as reflected on the Schedule L balance sheet.

Counsel also suggests that the petitioner's shareholder's equity should be considered in support of its financial ability to pay the beneficiary's wage. However, counsel fails to cite any specific case, memorandum, or other authoritative CIS determination that such an alternative method of calculating

¹ According to *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

ability to pay is acceptable. Furthermore, unless the source the petitioner would cite is a binding precedent decision, it will not be considered.

Finally, counsel asserts that the petitioner has assets from other businesses with which to pay the proffered wage. However, contrary to counsel's assertion, CIS may not "pierce the corporate veil" and look to the assets of the corporation's owner to satisfy the corporation's ability to pay the proffered wage. It is an elementary rule that a corporation is a separate and distinct legal entity from its owners and shareholders. See *Matter of M*, 8 I&N Dec. 24 (BIA 1958), *Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980), and *Matter of Tessel*, 17 I&N Dec. 631 (Act. Assoc. Comm. 1980). Consequently, assets of its shareholders or of other enterprises or corporations cannot be considered in determining the petitioning corporation's ability to pay the proffered wage.

The 2001 tax return reflects a taxable income before net operating loss deduction and special deductions of \$3,972 and net current assets of \$8,255. The petitioner could not pay the proffered wage in 2001 from either its taxable income or its net current assets.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.